United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7086

To be argued by
EDWIN LONGCOPE

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

ATLANTIC LINES LIMITED,

Plaintiff-Appellant,

—*v.*—

AMERICAN MOTORISTS INSURANCE COMPANY,

Defendant-Appellee.

On Appeal From An Order Of The United States District Court For The Southern District Of New York

REPLY BRIEF FOR APPELLANT

HILL, BETTS & NASH
Attorneys for Plaintiff-Appellant
One World Trade Center
Suite 5215
New York, New York
(212) 466-4900

EDWIN LONGCOPE
ALLAN J. BERDON
JOHN P. LOVE
Of Counsel

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REPLY BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This brief is submitted on behalf of plaintiff Atlantic Lines Limited ("Atlantic") in reply to the answering brief of defendant American Motorists Insurance Company ("American Motorists").

POINT I

THE DISTRICT COURT WAS IN ERROR AS A MATTER OF LAW IN REQUIRING ATLANTIC AS AN ALL RISKS INSURED TO DEMONSTRATE THE CAUSE OF ITS LOSS IN ORDER TO PROVE THAT THE LOSS WAS FORTUITOUS.

It is well settled that an insured such as Atlantic who sues in respect of a loss under a comprehensive all risks policy is not bound to prove the exact nature of the accident or casualty which occasioned the loss. British and Foreign Marine Insurance Company, Ltd. v. Gaunt [1921] 2 A.C. 41, 47, cited with approval Northwestern Mutual Life Insurance Co. v. Linard, 489 F.2d 556 (2 Cir., 1974). The very nature of the all risks policy provides coverage which insures against any loss without putting upon the insured the burden of establishing that the loss was due to a peril falling within the policy's coverage. Redna Marine Corporation v. Poland, 46 F.R.D. 81, 86 (S.D.N.Y. 1969). Having affirmatively found that Atlantic's proof of loss was persuasive (183a) the District Court erred as a matter of law in placing upon Atlantic, as an all risks insured, the further burden of establishing the cause of the loss (184a). See Jewelers Mutual Insurance Company v. Balogh, 272 F.2d 889, 891 (5 Cir., 1969).

In its answering brief in this Court, American Motorists now states, as it must, that "[i]t will be conceded that Atlantic was not bound to prove the exact nature of the casualty or accident which occasioned the loss, ..." (Answering Brief, p. 5). Unfortunately, American Motorists was not as candid or learned before the District Court judge when it maintained the opposite and erroneous legal position that "... unless Atlantic Lines could point to a specific cause of the loss, it is not entitled to recover under the policy." (Memorandum of Law Submitted in Opposition, p. 9.) The busy District Court adopted American Motorists' erroneous legal contention (184a), here repudiated, (Answering Brief, p. 5) and thereby committed reversible error.

POINT II

IN ANY EVENT ATLANTIC PROVED A PRIMA FACIE CASE

Contrary to the impression repeatedly sought to be created by American Motorists at pages 5 and 6 of its brief, the District Court held that Atlantic established its loss by persuasive evidence (183a) and rejected the suggestion of American Motorists that the equipment may still be in existence (183a).

The loss having been established to the satisfaction of the Court, the nature of the policy cast the burden on the insurer, not the assured, to demonstrate that the comprehensive all risks policy should not apply; and this American Motorists has failed to do. See Jewelers Mutual Insurance Company v. Balogh, supra.

American Motorists' reliance upon secondary presumptions or inferences[1/] should be rejected, First,

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1/ We note that since the District Court as the sole finder of fact relied exclusively on the party's submission of documentary evidence in the form of stipulated facts, documents and testimony taken by deposition, credibility was not at issue; and this Court is in as good a position as the District Court to read and interpret the pleadings, documents and depositions and to disregard any findings

with respect to the question of document production, the record is clear that the last interchange receipts are the relevant inventory records concerning the location and condition of the equipment at the pier at the time of the loss, and they are part of the record (139a-140a; 147a-149a; 151a-154a). Appellant's witness Camardella explained that upon the termination of Atlantic's service (122a) certain folders containing outdated interchange receipts made prior to those interchange receipts submitted in evidence were discarded in the ordinary course of Atlantic's business (85a-86a; 123a-124a). "The records were discarded because it was felt ... that there were sufficient records in the claims file here, but at the same time there was no trouble anticipated with the claims. It was felt to be a normal claim." (124a). This Court has stated that any adverse inference of the type suggested by American Motorists arising out of the unavailability of documents "can of course be rebutted by an adequate

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1/ not in accord with the record. Orvis v. Higgins, 180 F.2d 537, 539 (2 Cir., 1950); Securities & Exchange Commission v. Spectrum, Ltd., (2 Cir., 1973); See generally 5A Moore's Federal Practice ¶ 5204, et seq.

explanation for the non-production", Tupman Thurlow & Co. v. SS Cap Castillo, 490 F.2d 302, 308 (2 Cir., 1974), and such is the case here.

Second, the fact that in some cases there was a lengthy time gap between the last interchange record and report of loss does not create a question or presumption concerning the accuracy of plaintiff's inventory control system, as suggested by American Motorists; it merely indicates little or no turnover of equipment coincident with the termination of Atlantic's Liner service. Indeed, the accuracy of Atlantic's system of inventory control is measured by the fact that of the 478 containers on lease to Atlantic, 476 were returned to its lessor, the remaining 2 being the subject of suit (144a-146a).

Third, it is misleading to infer, as does American Motorists at page 3 of its brief, that no records were maintained with respect to the movement of equipment at the terminal. The clear import of Camardella's deposition testimony was that while no written records were kept on movements within a given terminal, except to indicate repair status (48a), each piece of equipment was at all times visually represented on a magnetic interchange or status board kept at the terminal (48a) and

variously classified as "ready", "down" "loaded", etc., (88a). Any movements into or out of the various terminals were reflected by interchange records such as those produced in evidence (84a, 139a-140a, 147a-149a, 151a-154a).

Contrary to the impression sought to be created by the all risks insurer, Atlantic established the location of the equipment at the pier at the time of the loss by reference to the interchange receipts marked in evidence; established the approximate time of loss by reference to these interchange agreements considered in conjunction with the daily and monthly physical inventory by it; and having established the loss by persuasive evidence to the satisfaction of the District Court (183a), was under no duty, as the District Court erroneously assumed, to pinpoint the loss as mysterious disappearance, unexplained loss, loss disclosed on the taking of inventory or otherwise, since each of the above perils and more were covered under the comprehensive all risks coverage purchased by the insured. Atlantic sustained its burden of proof and is entitled to recovery for its insured losses.

POINT III

THE DISTRICT COURT WAS IN ERROR IN FAILING TO RECOGNIZE THE CONCESSIONS MADE BY AMERICAN MOTORISTS

It remains undisputed that in its brief before the District Court (Memorandum of Facts and Law in Opposition, p. 5) American Motorists conceded liability to Atlantic for the cost of repairs to chassis No. TLCC 30046, for which a repair claim of $2,076.80 is made (8a) (169a-71a). The opinion of the District Court is devoid of any reference to plaintiff's concession of liability, although an incorrect amount.

It remains undisputed that the parties have stipulated that chassis No. TLCC 30018 for which a claim of $2,986.70 is made (8a) was found abandoned in a vacant lot in New Jersey with its identification obliterated (172a), two years after Atlantic reported its loss from the pier and had paid its lessor the depreciated value thereof (173a, 21a). The opinion of the District Court is devoid of reference to that portion of the Order and Stipulation of Additional Facts ¶ 1 (172a-173a) which sets forth the manner in which this chassis was recovered under circumstances clearly demonstrating that the loss was covered by the comprehensive nature of the all risks policy.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Atlantic's main brief herein, the decision and order of the District Court dismissing plaintiff's complaint should be reversed and judgment entered for plaintiff as against the defendant for the amount stated in the complaint.

Dated: New York, New York
July 29, 1976

Respectfully submitted,

HILL, BETTS & NASH
Attorneys for Plaintiff

Edwin Longcope,
Allan J. Berdon,
John P. Love,

Of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

FRANK SARRO being duly sworn deposes and says: That on the 2nd day of August, 1976, he served the attached Reply Brief for Appellant

upon Dougherty, Ryan, Mahoney, Pellegrino & Giuffra

the attorneys for the Appellee

named therein, at 576 Fifth Ave., New York, N.Y. 10036

by depositing a true copy thereof securely enclosed in a post-paid wrapper in a Post Office box regularly maintained by the United States Government at One World Trade Center, New York, New York 10048, directed to said attorneys at the last business address within the State designated by said attorneys for that purpose upon the preceding papers in this action. Deponent is over the age of eighteen years.

Frank Sarro
FRANK SARRO

Sworn to before me this 2nd day of August, 1976.

John P. Love
Notary Public

JOHN P. LOVE
Notary Public, State of New York
No. 31-7600400
Qualified in New York County
Term Expires March 30, 1978